

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

9	SPOKANE SCHOOL DISTRICT NO. 81,)	
10	a Washington non-profit)	
	corporation,)	NO. CV-04-0078-MWL
11)	
	Plaintiff,)	
12)	Findings of Fact and
	v.)	Conclusions of Law
13)	
	NORTHWEST BUILDING SYSTEMS,)	
14	INC., an Idaho corporation, and)	
	NORDYNE, INC., a Missouri)	
15	corporation,)	
16)	
	Defendants.)	

This matter came on for trial before the Court on February 21, 22, 23, 24, and 27, 2006. William E. Pierson, Jr., appeared for the Plaintiff. Andrew C. Bohrsen appeared for Defendant Northwest Building Systems, Inc. ("NBS") and Steven R. Stocker appeared for Defendant Nordyne, Inc. ("Nordyne").

Testifying in open court for Plaintiff was Ed Butterfield, Fire Investigator, Ron Kilgore, Electrical Engineer, Tim Wood, Maintenance Department Manager for Spokane Public Schools, Randy Lasswell, Mechanical Engineer for Spokane Public Schools, Bradley Wolfrum, Electrical Foreman for Spokane Public Schools, Carol Golden, a teacher at the Indian Trails Elementary School, and Cindy Coleman, Director of Accounting for Spokane Public Schools.

1 Testifying in open court for Defendant NBS was Ron Cooper, the
2 owner and operator of NBS, and Randolph Harris, a Forensic Engineer.

3 Testifying in open court for Defendant Nordyne was Allan Reifel,
4 the vice president of the engineering department for Nordyne.

5 Also testifying in open court were Michael Beraducci, an
6 electrician for the Spokane Public Schools, Kevin Guthrie, a steam
7 fitter for the Spokane Public Schools, and Gene Petefish, the foreman
8 of the HVAC department for the Spokane Public Schools.

9 All of the exhibits admitted in evidence have been reviewed and
10 considered by the Court, some of which are referenced below.

11 Having considered all of the foregoing evidence, the Court issues
12 this Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ.
13 P. 52(a).

14 Nature of the Proceedings and Jurisdiction

15 This is an action for recovery of alleged damages arising out of
16 a fire on October 20, 2001, to a modular classroom owned by the
17 Plaintiff at the Indian Trail Elementary School, 4102 West Woodside,
18 Spokane Washington. Defendant NBS manufactured the modular classroom
19 pursuant to a contract with Gelco Space (a non-party). The unit's
20 HVAC system was manufactured by defendant Nordyne and purchased by NBS
21 through Wesco Distributors (a non-party). Plaintiff has sued
22 Defendants for damages alleged to have been caused by this fire.
23 Plaintiff seeks an award of compensatory damages in the sum of
24 \$337,937.54 from the defendants. In accordance with RCW 19.86.090,
25 plaintiff also seeks an award of punitive damages, attorney fees and
26 litigation costs for Defendants' violation of the Washington Consumer
27 Protection Act, RCW 19.86.020.

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1 Jurisdiction in this matter is conferred on the United States
2 District Court for the Eastern District of Washington by virtue of 28
3 U.S.C. § 1332(a)(1). All parties to this lawsuit are citizens of
4 different states and the amount in controversy exceeds the sum of
5 \$75,000.00, exclusive of interest and costs. The parties have
6 consented to proceed before a United States Magistrate Judge in this
7 case. (Ct. Rec. 10).

8
9 Findings of Fact

10 The Court makes the following findings of fact from the evidence
11 and testimony presented at trial:

12 1. In June, 1992, Spokane Public Schools entered into a
13 construction contract with Gelco Space (now doing business as GE
14 Modular Space) to construct eleven (11) relocatable, two-classroom
15 units ("portables") and one relocatable, single classroom unit for
16 installation at twelve different schools throughout the School
17 District. One of these portables, B-101 and B-102, was to be
18 delivered and installed at the Indian Trail Elementary School.

19 2. Gelco Space subcontracted with NBS to construct the
20 portables contracted for by Spokane Public Schools.

21 3. The construction specifications for the portables were
22 prepared by architects for Spokane Public Schools.

23 4. Gelco Space provided the approved plans and specifications
24 for NBS to use in its construction of the portables.

25 5. The specifications submitted by Gelco Space to NBS provided
26 that the code which was required to be complied with in the
27 manufacturing of the portables was the "Washington Gold Label," WAC
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1 296-150F. The Washington Gold Label consists of a phase-by-phase
2 inspection of the portables to confirm compliance with specifications
3 on file with the state of Washington.

4 6. NBS purchased from Wesco Distributers ("Wesco") heat pumps
5 manufactured by Nordyne to provide heating and cooling for the
6 portables.

7 7. This was the first time NBS had installed a Nordyne heat
8 pump with a portable. NBS had previously installed heat pumps
9 manufactured by Bard, a competitor of Nordyne, in the portables NBS
10 had constructed for Gelco Space.

12 8. The heat pump manufactured by Nordyne for use in the
13 portables was the model PWY-036 Wall King External Vertical Mounted
14 Heat Pump.

15 9. This Nordyne heat pump is an Underwriter Laboratories ("UL")
16 tested and listed HVAC unit that was factory installed with 10 KW
17 auxiliary heat capacity and is UL listed for a maximum auxiliary heat
18 capacity of 15 KW.

19 10. The industry standard calls for a one-quarter inch clearance
20 between the heat pump and combustibles.

22 11. The Nordyne heat pump installation instructions call for a
23 one inch clearance to be provided on all four sides of the supply duct
24 for the first three feet of the duct attached to the outlet airframe,
25 or between the heating element portion of the heat pump and any
26 combustible material.

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1 12. The 1991 edition of the Uniform Mechanical Code required
2 that a heat pump be installed on the exterior of a portable such that
3 a one inch clearance was maintained between the heating element
4 portion of the heat pump and any combustible material. The 1990
5 edition of the National Electrical Code required the same one inch
6 clearance.

7
8 13. The statute applicable to factory built commercial
9 structures is RCW 43.22.480.

10 14. Pursuant to RCW 43.22.480(1):

11 The Department [of Labor & Industries] shall adopt and enforce
12 rules that protect the health, safety and property of the people
13 of this state by assuring that all factory built housing or
14 factory built commercial structures are structurally sound and
15 that the plumbing, heating, electrical and other components
16 thereof are reasonably safe. The rules shall be reasonably
17 consistent with recognized and accepted principles of safety and
18 structural soundness, and in adopting the rules **the department**
19 **shall consider, so far as practicable, the standards and**
20 **specifications contained in the uniform building, plumbing and**
21 **mechanical codes**, including the barrier free code and the
22 Washington energy code as adopted by the state building code
23 council pursuant to Chapter 19.27A RCW, **and the national**
24 **electrical code**, including the state rules as adopted pursuant to
25 chapter 19.28 RCW and published by the national fire protection
26 association or, when applicable, the temporary worker building
27 code adopted under RCW 70.114A.081.

28 RCW 43.22.480(1) (emphasis added).

15. Ron Cooper indicated that the Washington Gold Label standard
allows for variances from the standards and specifications contained
in the uniform building code and national electrical code.

16. The Washington Gold Label standard is the adopted building
code that governs the manufacturing process carried out by
manufacturers of modular classrooms in the state of Washington.

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1 17. The Court finds that the testimony of Ron Cooper regarding
2 the Washington Gold Label process is credible and persuasive.

3 18. Ron Cooper stated that the design specifications that Gelco
4 Space's engineering staff had submitted to the state of Washington for
5 design review showed a zero clearance for the heat pump.

6 19. The Washington Gold Label standard does not contain a
7 specific requirement for a one inch clearance at any given location on
8 the heat pump.

9 20. Randolph Harris stated that, under normal operating
10 conditions, no clearance is necessary between the heating portion of
11 the heat pump and combustible materials.

12 21. NBS used a three-eighths inch template and provided a three-
13 eighth's inch clearance between the heating element portion of the
14 heat pump and combustible materials as installed on the portables in
15 1992.

16 22. A plastic sleeve containing the owner's manual, installation
17 instructions, service manual and replacement parts list was placed in
18 each Nordyne heat pump control box prior to the unit being packaged in
19 its shipment container.

20 23. When NBS received the Nordyne heat pumps, the heat pumps had
21 already been removed from their shipping containers and packaging.

22 24. NBS did not receive manufacturing installation instructions
23 for the Nordyne heat pumps from Wesco. NBS nevertheless planned to
24 construct the portables in compliance with the plans and
25 specifications it was provided by Gelco Space's engineering staff and
26 in accordance with the Washington Gold Label design review process.

1 25. At no time prior to installing the heat pumps did NBS
2 contact either Wesco or the Nordyne technical service department to
3 inquire about installation instructions.

4 26. When the portables were delivered to the School District,
5 Gelco Space submitted to the School District a binder containing all
6 product information, installation instructions, maintenance
7 information and warranties for all mechanical equipment contained in
8 each portable, including the Nordyne heat pumps.

9
10 27. Mr. Cooper's explanation of the process for obtaining the
11 Gold Label seal indicated that state inspectors examine each phase of
12 the construction and certify whether the unit complies with the Gold
13 Label standard. After the building is completed, a final inspection
14 takes place and, if the Washington Gold Label standard has been
15 complied with, an inspector affixes a Gold Label seal to the unit.

16 28. The portable delivered to Indian Trail Elementary School had
17 a properly issued Gold Label seal permanently affixed to its exterior.

18 29. The Nordyne heat pump installed for the portable by NBS
19 originally possessed a heating element with two five-kilowatt ("KW")
20 heating strips supplying a total of 10 KW of heating capacity.

21
22 30. The School District experienced a number of problems with a
23 lack of heat in the portables built by NBS, primarily due to the
24 inability of the heat pumps to extract enough warm air from the
25 environment during Spokane's cold winter months.

26 31. In October of 1996, Spokane Public Schools decided to add
27 an additional 10 KW of heating capacity to all Nordyne heat pumps

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1 supplied with the portables NBS delivered in 1992 in an attempt to
2 deal with the low heat problems.

3 32. Modifications were done by the School District personnel,
4 and these modifications were not inspected or examined by an outside
5 agency or an independent electrical engineer.

6 33. Spokane Public Schools did not inform anyone from Nordyne or
7 NBS that they added the additional 10 KW of heating capacity to the
8 Nordyne heat pumps.

9 34. The 10 KW heating banks that were installed in all of the
10 portables in the fall of 1996 exceeded the recommended safe operating
11 heat capacity and voided the UL rating for the Nordyne heat pumps and
12 the certification of the modular units.

13 35. The School District continued to have problems with a lack
14 of heat over the next five years.

15 36. On October 12, 2001, the School District received a report
16 that the heat pump in Indian Trail Elementary classroom B-102 was not
17 producing heat.

18 37. Carol Golden, the teacher stationed at classroom B-102,
19 indicated that the unit was blowing cold air.

20 38. According to School District maintenance records, School
21 District personnel performed repairs or maintenance on the heat pump
22 each day from October 15 to October 19.

23 39. There was no evidence regarding the nature of those repairs
24 only that the repairs resulted in a restoration of heat to the
25 classroom.

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1 40. Ms. Golden indicated that the repairs restored heat to the
2 classroom. Ms. Golden's testimony indicated that hot air was blowing
3 and the fan was operating on Friday, October 19, 2001.

4 41. On Friday, October 19, 2001, before leaving the classroom at
5 the end of the day, Ms. Golden noticed that the indoor thermostat had
6 lights illuminated indicating that the auxiliary heat and emergency
7 heat were both on. The inference from this testimony is that both the
8 original heating elements and those added by the School District were
9 operating and producing heat at that time.

10 42. In the early morning hours of October 20, 2001, a fire
11 started in the wall area next to the Nordyne heat pump at the east end
12 of portable B-102 at the Indian Trail Elementary School.

13 43. The City of Spokane Fire Department was called and the fire
14 was extinguished later that morning.

15 44. The fire caused substantial physical damage to classroom B-
16 102 and the classroom's personal property contents.

17 45. Ed Butterfield, a local fire investigator, conducted an
18 independent investigation into the origin and cause of this fire. Mr.
19 Butterfield had an opportunity to examine the fire scene on October
20 24, 2001.

21 46. Mr. Butterfield determined that the fire originated at the
22 exterior east wall of portable B-102. Mr. Butterfield concluded the
23 fire was caused by the ignition of the combustible exterior siding for
24 the portable by the Nordyne heat pump.

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1 47. Mr. Butterfield testified that he could not determine the
2 amount of clearance around the entire top side of the duct because of
3 the fire damage; however, he did observe a clearance of approximately
4 one-half inch on the top side of the duct that remained undamaged by
5 the fire.

6 48. The Court finds Mr. Butterfield's testimony credible and
7 persuasive.

8 49. The Nordyne heat pump was removed from the fire scene and
9 shipped to Ron Kilgore, an electrical engineer, so that Mr. Kilgore
10 could examine the Nordyne heat pump to determine the cause of the fire
11 at Indian Trail Elementary School.

12 50. Mr. Kilgore opined that the fire was caused by the
13 following: (a) At some point before October 20, 2001, an electronic
14 component ("sequencer") that turned the original ten kilowatt heating
15 element for the Nordyne heat pump on and off failed in the on position
16 while the fan inside the heat pump was off. This heating element
17 produced temperatures in excess of 450 degrees Fahrenheit (the
18 ignition temperature of the exterior siding for the portable) in the
19 supply air duct which was in direct contact with the combustible
20 exterior siding for the portable and which ignited the combustible
21 exterior siding; (b) At the time of the fire, the ten kilowatt heating
22 element installed by the School District in 1996 was not in operation;
23 (c) If the Nordyne heat pump had been properly designed, the sequencer
24 that failed would not have done so such that the original heating
25 element continued to operate. Rather, if properly designed, when the
26 sequencer failed, the heating element would have been automatically
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1 de-energized; and (d) The Nordyne heat pump had been improperly
2 installed by NBS without a one inch clearance between the heat pump
3 and the combustible exterior siding in violation of Nordyne's
4 installation instructions, the Uniform Mechanical Code and the
5 National Electrical Code. This lack of a one inch clearance was a
6 cause of the fire.

7
8 Mr. Kilgore's testing conditions, however, were dissimilar to the
9 conditions at the Indian Trail Elementary School. The exemplar
10 provided and tested by Mr. Kilgore did not contain a roof structure.
11 Heat was thus allowed to escape or dissipate into the open air upon
12 testing. Under these circumstances, and for other reasons, the Court
13 finds Mr. Kilgore's testimony regarding the one inch clearance not
14 persuasive and subject to considerable concern.

15 The Court finds Mr. Kilgore's opinions and testimony not
16 persuasive or credible in light of all of the evidence in this case.

17
18 51. The initial inspection of the Indian Trail heat pump and
19 sequencer was carried out by Mr. Kilgore in conjunction with Randolph
20 Harris and in accordance with an inspection protocol established by
21 Mr. Kilgore. That protocol provided for an X-ray of the sequencer.

22 52. The two experts agreed that the heat pump's sequencer would
23 have to be x-rayed.

24 53. Initial electrical resistance measurements by both experts
25 showed the sequencer was normal.

26 54. Mr. Kilgore retained possession of the sequencer and agreed
27 to contact Mr. Harris when the x-ray procedure was scheduled. Mr.
28 Kilgore never contacted Mr. Harris, but rather, independently examined

1 the sequencer which ultimately resulted in the sequencer's
2 destruction. As a result, Mr. Harris was unable to x-ray the
3 sequencer and was not able to perform any further testing of the
4 sequencer.

5 55. With regard to Nordyne's motion in limine as to the
6 exclusion of evidence regarding an alleged defect in the heat pump
7 sequencer due to the spoliation of the evidence, the Court denies the
8 motion and permits such evidence. However, as noted above, the Court
9 finds that Mr. Kilgore's testimony in its entirety, including evidence
10 related to sequencer failure, is not persuasive.
11

12 56. At trial, Plaintiff proffered the testimony of Mr. Kilgore
13 regarding measurements of the opening into the classroom evidencing,
14 in Mr. Kilgore's opinion, a lack of clearance between the supply air
15 duct and the combustible exterior siding. The Court will allow the
16 proffer to stand, but, as indicated above, finds Mr. Kilgore's overall
17 testimony unpersuasive when viewed in consideration of all of the
18 evidence in this case.
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20 57. The Court finds Mr. Harris' testimony that the sequencer
21 appeared intact, unchanged and not loose upon initial examination to
22 be persuasive and credible.

23 58. Mr. Harris opined that the cause of the fire at the Indian
24 Trail Elementary School was the 1996 modification to the heat pumps by
25 the School District.

26 59. Mr. Harris indicated that adding 10 KW to the heat pump
27 voided the Nordyne heat pump's UL rating and caused the high limit
28 switch to repeatedly cycle during normal operation. The high limit

1 switch should not function in a normal setting; therefore, the 1996
2 modification caused the Nordyne heat pumps to be in a continuous state
3 of malfunction. The normal life expectancy of the high limit switch
4 was reduced and eventually failed. Once the high limit switch failed,
5 the temperatures in the hot air supply duct increased to a level far
6 in excess of temperatures attained during normal operation.

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8 60. Mr. Harris stated that, if there was a failure of the
9 sequencer in the on position and a failure of the high limit switch,
10 the ignition of the fire would have occurred whether or not the
11 clearance had been one inch.

12 61. The Court finds the testimony of Mr. Harris regarding the
13 cause of the fire at the Indian Trail Elementary School credible and
14 persuasive.

15 62. On June 7, 2002, a fire substantially damaged a portable
16 located at Pratt Elementary School, 6903 East 4th Avenue, Spokane,
17 Washington, 99212.

18 63. Mr. Butterfield had an opportunity to examine the fire scene
19 and concluded that the fire at the Pratt Elementary School was a
20 mirror image of the fire at the Indian Trail Elementary School in
21 October, 2001.

22 64. The fire at Pratt Elementary was caused by a Nordyne heat
23 pump, delivered in 1992, igniting the combustible exterior siding of
24 the portable.

25 65. When the heating portion of the Nordyne heat pump at Pratt
26 was closely examined, it was discovered that the additional 10 KW heat
27 bank added by the School District to the Nordyne heat pump had been
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1 miswired causing the sequencer and high limit switch to malfunction
2 and the Nordyne heat pump to operate in the on position continuously.

3 66. The wiring error was attributed to work done by electricians
4 employed by Spokane Public Schools. It is undisputed that the Pratt
5 Elementary fire was caused by the negligence of the School District.

6 67. In the course of examinations conducted by NBS of the
7 portable at the Indian Trail Elementary School, as well as other
8 portables manufactured by NBS in 1992, it was revealed that plenums
9 and duct work had been dented and bent and half-inch sheetrock, not
10 installed by NBS, had been added to the portable around the air intake
11 duct. These facts evidence that the entire HVAC system had, at some
12 point, been removed from the wall of the portable and then reattached
13 subsequent to leaving the NBS factory.

14 68. As a result of the two fires at Indian Trail and Pratt
15 Elementary Schools, Spokane Public Schools undertook a retrofit effort
16 in the summer of 2002. This retrofit effort modified the manner in
17 which heat pumps delivered with portables manufactured by NBS in 1992
18 were attached to the exterior siding of these portables.

19 69. The 10 KW heating elements installed for the Nordyne heat
20 pumps in 1996 were removed, and new 10 KW heating elements were
21 installed directly in the supply air ducts inside the portables (duct
22 heaters) augmenting the 10 KW heating elements that originally came
23 with the Nordyne heat pumps. However, at the Indian Trails Elementary
24 School, the replacement portable had an entirely different stand alone
25 heating and air conditioning system installed.

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1 70. Examination of the portables following the retrofit reveals
2 that a one inch clearance is still not provided between the heating
3 element portion of the heat pump and combustible materials for the
4 first three feet of the supply duct on many of the portables following
5 the retrofit.

6 71. It cost Spokane Public Schools \$178,324.64 to repair the
7 fire damage to portable B-102 at Indian Trail Elementary School caused
8 by the fire on October 20, 2001. Hartford reimbursed Spokane Public
9 Schools the sum of \$164,316.37 for this damage.

10 72. It cost the Spokane Public Schools \$159,612.92 to modify all
11 of the portables delivered by NBS in 1992 with Nordyne heat pumps.

12 73. Many of the repairs and damages sought by Plaintiff are for
13 a betterment of the HVAC system and would not have been recoverable
14 had this Court ruled in favor of the Plaintiff in this case.
15

16 Conclusions of Law

17 **A. Duty To Warn/Nordyne**

18 Spokane Public Schools is pursuing a claim for damages against
19 Nordyne in this lawsuit based on the following two theories of
20 recovery: (1) defective design/failure to warn under the Washington
21 Product Liability Act; and (2) violation of the Washington CPA.
22

23 Plaintiff's first claim against Nordyne is for its alleged
24 failure to warn under the Washington Product Liability Act. (Ct. Rec.
25 1). A plaintiff establishes that a product is not reasonably safe by
26 showing that "at the time of manufacture, the likelihood that the
27 product would cause the claimant's harm or similar harms, and the
28 seriousness of those harms, rendered the warnings or instructions of

1 the manufacturer inadequate and the manufacturer could have provided
2 the warnings or instructions which . . . would have been adequate."
3 RCW 7.72.030(1)(b).

4 To establish a successful claim under RCW 7.72.030(1)(b), Spokane
5 Public Schools must demonstrate that Nordyne's failure to warn of a
6 possible danger associated with the heat pump was a proximate cause of
7 its damages. *Hiner v. Bridgestone/Firestone, Inc.*, 138 Wn. 2d 248,
8 256, 978 P. 2d 505 (1999); *Ayers v. Johnson & Johnson Baby Prods. Co.*,
9 117 Wn.2d 747, 754, 818 P.2d 1337(1991).

11 Plaintiff contends that Nordyne, the manufacturer, of the heat
12 pump, a relevant product for purposes of the Washington Product
13 Liability Act, provided a heat pump which was not reasonably safe
14 because adequate warnings or instructions were not provided to NBS,
15 the installer of the Nordyne heat pumps. Plaintiff claims that
16 Nordyne violated the requirements of the Uniform Mechanical Code by
17 supplying a heat pump for installation which did not possess a label
18 affixed to the exterior housing specifically identifying the proper
19 clearance between the heat pump and combustible materials.

21 Regardless of the state of the label affixed to the exterior
22 housing of the unit, it is undisputed that the Nordyne installation
23 instructions provide for a one inch clearance between the air supply
24 duct and surrounding combustible materials for the first three feet of
25 the duct systems, and the evidence has demonstrated that said
26 installation instructions were sent with the Nordyne units to Wesco.
27 Although NBS has indicated that at the time it received the Nordyne
28 heat pumps from its distributor (Wesco), the installation instructions

1 were not included, Nordyne cannot be held responsible for the
2 intervening negligence of Wesco, a non-party.

3 If the original negligence of a defendant is followed by an
4 unforeseeable independent intervening cause, force, or act of a third
5 party that is the proximate cause of an injury or event, the chain of
6 proximate causation is broken. *Qualls v. Golden Arrow Farms*, 47 Wn.2d
7 599 (1955). If the independent intervening cause, force, or act is
8 not reasonably foreseeable, it is deemed to supercede the defendant's
9 original negligence. The defendant's original negligence ceases to be
10 the proximate cause. *Maltman v. Sauer*, 84 Wn.2d 975 (1975). Wesco's
11 act of non-delivery of the installation instructions along with the
12 unpackaged heat pumps to NBS was an unforeseeable negligent act that
13 supersedes the alleged liability of Nordyne in failing to give
14 adequate warnings or instructions regarding the need for a one inch
15 clearance between the heat pump's air supply duct and the surrounding
16 combustibile materials.
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18 Moreover, NBS constructed the portables in compliance with the
19 specifications it was provided by Gelco Space's engineering staff in
20 accordance with the Washington Gold Label design review process, not
21 as dictated by the Nordyne installation instructions. NBS thus never
22 relied on the Nordyne installation instructions. It was reasonable
23 for Nordyne to assume that NBS would comply with their installation
24 instructions. In addition, Nordyne was never informed that NBS did
25 not receive installation instructions. At no time prior to installing
26 the heat pumps did NBS contact either Wesco or the Nordyne technical
27 service department to inquire about the whereabouts of the Nordyne heat
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1 pump installation instructions or to seek directives as to
2 installation.

3 Based on the foregoing, Plaintiff cannot prevail against Nordyne
4 on the theory of failure to warn under the Washington Product
5 Liability Act. The Court finds in favor of Defendant Nordyne and
6 against Plaintiff Spokane Public Schools on Plaintiff's claim against
7 Nordyne for the failure to warn under the Washington Product Liability
8 Act.

9
10 **B. Defective Design/Nordyne**

11 Plaintiff also maintains a claim against Nordyne for defective
12 design under the Washington Product Liability Act. In order to
13 establish a claim for defective design under the Washington Product
14 Liability Act, the plaintiff must show: (1) a manufactured product
15 (2) was not reasonably safe as designed and (3) caused harm to the
16 plaintiff. RCW 7.72.030(1)(a); *Bruns v. PACCAR, Inc.*, 77 Wn. App.
17 201, 208, 890 P.2d 469, review denied, 126 Wn.2d 1025 (1995).

18
19 Two alternative tests may be used to establish that a product was
20 not reasonably safe as designed: the risk-utility test and the
21 consumer expectations test. *Thongchoom v. Graco Children's Products,*
22 *Inc.*, 117 Wn. App. 299, 304, 71 P.3d 214 (2003). Under the risk-
23 utility test, liability can be established by showing that, "at time
24 of manufacture, the likelihood that the product would cause the
25 plaintiff's harm or similar harms, and the seriousness of those harms,
26 outweighed the manufacturer's burden to design a product that would
27 have prevented those harms and any adverse effect a practical,
28 feasible alternative would have on the product's usefulness." *Lecy v.*

1 *Bayliner Marine Corp.*, 94 Wn. App. 949, 959-60, 973 P.2d 1110 (1999)
2 (*quoting Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 326,
3 971 P.2d 500 (1999), *review denied*, 139 Wn. 2d 1025 (2000)).

4 Plaintiff asserts that Nordyne, the manufacturer of the heat
5 pump, a relevant product for purposes of the Washington Product
6 Liability Act, defectively designed their heat pump which caused
7 Plaintiff's injuries. Specifically, Plaintiff argues that Mr.
8 Kilgore's testimony established a defective design, because the
9 electrical control circuitry for the heat pump did not foresee a
10 partial failure of the sequencer where only one of the two contacts
11 for the sequencer inadvertently closed. If both contacts in the
12 sequencer failed, the heating element for the heat pump would
13 automatically shut off. However, if only one of the two contacts
14 inadvertently closed, the heating element would continue to operate
15 while the cooling fan was off. This allowed the heating element to
16 generate temperatures in excess of the ignition temperatures of
17 combustibles the heat pump was directly in contact with. According to
18 Mr. Kilgore, this caused the fire at the Indian Trail Elementary
19 School.
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22 The evidence demonstrates that the Nordyne heat pump was a UL
23 listed product which indicates that the original product complied with
24 industry safety standards. Plaintiff's witnesses, Mr. Kilgore and Mr.
25 Wolfrum, testified that the original heat pump violated no codes and
26 was only taken out of the UL listings after the School District
27 modified the product in 1996. According to Mr. Wolfrum's testimony,
28 UL proves that a product fails safe.

1 With regard to Mr. Kilgore's expert testimony about the alleged
2 sequencer failure, it is undisputed that when Mr. Kilgore received the
3 sequencer, a year and a half after the fire, and initially inspected
4 it in conjunction with Mr. Harris, they found nothing abnormal or
5 faulty with the sequencer. They found it to be in a condition where
6 both contacts were open. Then, a month later, Mr. Kilgore conducted
7 further testing of the sequencer without notifying Mr. Harris. Mr.
8 Kilgore testified that when he handled the sequencer on this occasion
9 it fell apart in his hands.¹ However, prior to the destruction of the
10 sequencer, Mr. Kilgore stated that he found a contact in the sequencer
11 to be in a failed "closed" state that would support his conclusions
12 about the cause of the fire. The Court is not persuaded by Mr.
13 Kilgore's opinions regarding the failure of the sequencer and finds
14 his testimony not credible in light of all the evidence in this case.

15 Mr. Kilgore's testimony regarding the sequencer failure is
16 further contradicted by Ms. Golden's testimony that the unit was
17 "blowing cold air" the week just prior to the fire and then worked
18 just fine (blowing heat) following work performed by the School
19 District's maintenance workers. Had the unit failed in the manner Mr.
20 Kilgore described, the fan could not have been operating.

21 It is undisputed that the 1996 action of the School District in
22 doubling the heating capacity of the heat pump exceeded the unit's UL
23 tested heat safety level and thus voided the unit's UL rating. The
24 modifications by the School District in 1996 resulted in the ultimate
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26 ¹During the initial testing of the sequencer, Mr. Harris testified that the
27 sequencer appeared to be "solid," not brittle or fragile, not heat damaged, and in
28 good shape.

1 failure of the high limit switch. It is uncontested that had the high
2 limit switch not failed, the overheating could not have occurred. The
3 School District's 1996 modification, which voided the Nordyne heat
4 pump's UL listing, was unforeseeable and intervening. The evidence
5 does not demonstrate that the Nordyne heat pumps were unsafe in design
6 prior to the School District's 1996 modification. This is further
7 demonstrated by the fact that the retrofit effort undertaken by the
8 School District in the summer of 2002 essentially returned the Nordyne
9 units to their original state.
10

11 The undersigned finds in favor of Defendant Nordyne and against
12 Plaintiff Spokane Public Schools on Plaintiff's claim of unsafe design
13 under the Washington Product Liability Act.

14 **C. Defective Construction/NBS**

15 Spokane Public Schools has sued NBS under two theories of
16 recovery: (1) defective construction under the Washington Product
17 Liability Act; and (2) violation of the Washington CPA, RCW 19.86.020.
18

19 With regard to Plaintiff's defective construction claim under the
20 Washington Product Liability Act, Plaintiff argues that both the
21 uniform mechanical code and the national electrical code required that
22 the heat pump for the portable at issue be installed by NBS with a
23 clearance of one inch between the heating element portion of the heat
24 pump and any combustible material. Since NBS did not comply with the
25 requirements of the uniform mechanical code and the national
26 electrical code, Plaintiff argues that they are strictly liable for
27 the fire at the Indian Trail Elementary School pursuant to RCW
28 7.72.030(2)(a).

1 To recover under a theory of strict liability, pursuant to RCW
2 7.72.030(2)(a), for a failure to manufacture a product that is
3 reasonably safe in construction, a plaintiff must show that when the
4 product left the control of the manufacturer, the product deviated in
5 some material way from the design specifications or performance
6 standards of the manufacturer, or deviated in some material way from
7 otherwise identical units in the same product line. RCW
8 7.72.030(2)(a).
9

10 Plaintiff asserts that the portable qualified as a "factory built
11 commercial structure" for purposes of RCW 43.22.450. Under RCW
12 43.22.450(7), a "commercial structure" is defined as "a structure
13 designed or used for human habitation, or human occupancy for
14 industrial, educational, assembly, professional or commercial
15 purposes." Commercial structures are subject to regulation under RCW
16 43.22.480(1):
17

18 The Department [of Labor & Industries] shall adopt and enforce
19 rules that protect the health, safety and property of the people
20 of this state by assuring that all factory built housing or
21 factory built commercial structures are structurally sound and
22 that the plumbing, heating, electrical and other components
23 thereof are reasonably safe. The rules shall be reasonably
24 consistent with recognized and accepted principles of safety and
25 structural soundness, and in adopting the rules **the department**
26 **shall consider, so far as practicable, the standards and**
27 **specifications contained in the uniform building, plumbing and**
28 **mechanical codes**, including the barrier free code and the
Washington energy code as adopted by the state building code
council pursuant to Chapter 19.27A RCW, **and the national**
electrical code, including the state rules as adopted pursuant to
chapter 19.28 RCW and published by the national fire protection
association or, when applicable, the temporary worker building
code adopted under RCW 70.114A.081.

RCW 43.22.480(1) (emphasis added).

1 NBS asserts that they were required to comply with only the
2 "Washington Gold Label Standard," not the specifics of the uniform
3 mechanical code or the national electrical code. NBS has established
4 that the Washington Gold Label standard is an adopted building code
5 that governs the manufacturing process carried out by NBS and all
6 other manufacturers of modular classrooms for use in the state of
7 Washington. WAC 296-150F.
8

9 The Washington Gold Label process consists of a phase-by-phase
10 inspection of the manufactured portables to confirm compliance with
11 specifications on file with the state of Washington. Mr. Cooper
12 explained the process for obtaining the Gold Label. Plans and
13 specifications for the construction of the units are submitted by the
14 contractor (in this case, Gelco) to the state Department of Labor and
15 Industries for approval. Once approved, and only after approval, the
16 manufacturing of the building, pursuant to those plans and
17 specifications, can begin. State inspectors examine each phase of the
18 construction and certify whether the unit complies with the Gold Label
19 standard. After the building is completed, a final inspection takes
20 place and, if the Washington Gold Label standard has been complied
21 with, an inspector affixes a Gold Label seal to the unit.
22

23 RCW 43.22.480(1) indicates that the Department of Labor and
24 Industries shall adopt rules concerning factory built commercial
25 structures and in doing so shall consider the standards in the uniform
26 building, plumbing, mechanical and electrical codes, "so far as
27 practicable." However, it has been demonstrated that the Washington
28 Gold Label is the standard adopted by the Washington State Department

1 of Labor and Industries for use for the manufacturing of portables,
2 and the design specifications that Gelco Space's engineering staff
3 submitted to the state for design review called for NBS to act in
4 accordance with the Washington Gold Label standard in the construction
5 of the portables. The Washington Gold Label standard does not contain
6 a specific requirement for a one inch clearance at any given location
7 within the unit. Moreover, Ron Cooper stated that the design
8 specifications that Gelco Space's engineering staff had submitted to
9 the state for review showed a zero clearance for the heat pump, and
10 Randolph Harris stated that, under normal operating conditions, no
11 clearance is necessary between the heating portion of the heat pump
12 and combustible materials. Nevertheless, NBS used a three-eighths
13 inch template to provide a three-eighth's inch clearance between the
14 heating element portion of the heat pump and combustible materials in
15 the 1992 portables. Upon completion of the state's final inspection,
16 the unit shipped to Plaintiff and put into use at the Indian Trail
17 Elementary School passed inspection as being code compliant and had
18 the Gold Label seal affixed to the building. Accordingly, the
19 evidence shows that NBS complied with the design specifications that
20 Gelco Space's engineering staff had submitted to the state for design
21 review.
22
23

24 Furthermore, if the original negligence of a defendant is
25 followed by an unforeseeable independent intervening cause, force, or
26 act of a third party that is the proximate cause of an injury or
27 event, the chain of proximate causation is broken. *Qualls v. Golden*
28 *Arrow Farms*, 47 Wn.2d 599 (1955). If the independent intervening

1 cause, force, or act is not reasonably foreseeable, it is deemed to
2 supercede the defendant's original negligence. The defendant's
3 original negligence ceases to be the proximate cause. *Maltman v.*
4 *Sauer*, 84 Wn.2d 975 (1975).

5 The modifications of the portable's HVAC system performed by the
6 School District in 1996, the "repairs" performed on the unit itself by
7 the school district the week of the fire, and the denting of the
8 plenum and installation of half-inch sheetrock, not installed or
9 accomplished by NBS, all completed without further state or
10 independent inspection, were unforeseeable negligent acts that
11 supersedes any alleged liability of NBS for defective construction of
12 the portable. In addition, both Mr. Kilgore and Mr. Harris testified
13 that, without all of the failures to the components of the heat pump
14 itself, the temperature would not have risen to point of igniting a
15 fire on the siding - - an additional unforeseen, intervening cause.

17 Based on the foregoing, the Court finds that NBS' construction of
18 the portable at the Indian Trail Elementary School was not defective.
19 The evidence demonstrates that the construction performed by NBS was
20 in accordance with the Washington State Gold Label standards and
21 passed inspection based on those standards. Accordingly, the Court
22 rules in favor of Defendant NBS and against Plaintiff Spokane Public
23 Schools on Plaintiff's defective construction claim under the
24 Washington Product Liability Act.

26 **D. Washington CPA Violation**

27 The Washington Consumer Protection Act ("CPA") prohibits
28 "[u]nfair methods of competition and unfair or deceptive acts or

1 practices in the conduct of any trade or commerce." RCW 19.86.020.
2 To establish a CPA claim, the plaintiff must show: (1) an unfair or
3 deceptive act or practice, (2) occurring in trade or commerce, (3)
4 that impacts the public interest, and (4) proximately causes injury,
5 (5) to the plaintiff's business or property. *Guijosa v. Wal-Mart*
6 *Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001); *Hangman Ridge*
7 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-
8 93, 719 P.2d 531 (1986).

9
10 To establish an unfair or deceptive practice, it is not necessary
11 to prove intent to deceive. *Haner v. Quincy Farm Chems., Inc.*, 97
12 Wn.2d 753, 759, 649 P.2d 828 (1982).

13 Whether the public has an interest in any given action is to be
14 determined by the trier of fact from several factors, depending upon
15 the context in which the alleged acts were committed. *Hangman Ridge*
16 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d at 790-91.
17 The factors include: "(1) Were the alleged acts committed in the
18 course of defendant's business? (2) Did defendant advertise to the
19 public in general? (3) Did defendant actively solicit this particular
20 plaintiff, indicating potential solicitation of others? (4) Did
21 plaintiff and defendant occupy unequal bargaining positions?" *Id.*
22 None of these factors is dispositive. Nor is it necessary that all of
23 these factors be present. The factors "represent indicia of an effect
24 on public interest from which a trier of fact could reasonably find
25 public interest impact." *Id.*

26
27 ///

28 ///

1 **1. NBS**

2 With Regard to the CPA claim against NBS, Spokane Schools argues
3 as follows:

4 (1) NBS engaged in an unfair or deceptive act of practice by
5 installing Nordyne heat pumps on 23 portables constructed for
6 Spokane Schools in 1992 without first consulting Nordyne's
7 installation instructions and knowing, from previous experience
8 with a competitor's heat pumps, that the heat pump would need
9 some sort of clearance from combustible materials; (2) The act or
10 practice occurred in the conduct of NBS' trade or commerce
11 because all of the acts complained of occurred in the
12 construction of the portables by NBS; (3) The act or practice
13 affected the public interest because NBS was building classrooms
14 to house 621 students at 12 schools throughout the school
15 district; (4) Plaintiff was injured in either its business or its
16 property due to the cost to repair the fire damage at Indian
17 Trail Elementary and to modify all of the portables delivered by
18 NBS in 1992 with Nordyne heat pumps so that the heat pumps
19 possessed a clearance of one inch between the heat pump and the
20 combustible exterior siding; and (5) NBS' act or practice caused
21 Plaintiff's injury as evidenced by Ron Kilgore's testing which
22 confirmed that if the heat pump had been installed with a one
23 inch clearance, the temperature at the interface between the
24 heating pump and the exterior siding of the portable would not
25 have been greater than 250 degrees Fahrenheit, well below the
26 siding's ignition temperature of 450 degrees Fahrenheit.

27 (Ct. Rec. 64, p. 15).

28 NBS concedes that the second and fourth elements of the CPA have
been met: "occurring in trade or commerce" and "injury to Plaintiff's
property." However, NBS contests the other three elements. (Ct. Rec.
62 , pp. 47-49).

NBS asserts that the question with regard to unfair and deceptive
acts is whether the action has the capacity to deceive a substantial
portion of the purchasing public. *Luxon v. Caviezal*, 42 Wn. App. 261
(1985); *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30 (1997).

"Factors to be considered in assessing potential public impact are
whether the facts suggest a pattern or conduct, the potential for

1 repetition, and the likelihood that others will be affected." *Hangman*
2 *Ridge*, 105 Wn.2d at 790.

3 NBS maintains it continues to be governed by the Washington Gold
4 Label Standard in its installation methods. NBS persists that the
5 Gold Label standard may require less than a one inch clearance between
6 the heating element portion of a heat pump and any combustible
7 material in its installation of heat pumps on portables. Therefore,
8 contrary to NBS' arguments, it is apparent that the installation
9 methods of NBS displays a pattern of conduct, with repetition to
10 others and a potential for affecting others. Moreover, also present
11 is the potential to deceive a substantial portion of the public.
12

13 Nevertheless, the main issue with regard to the CPA in this case
14 is whether NBS has acted in an unfair or deceptive manner. The
15 evidence indicates that NBS has not.

16 NBS did not prepare the plans and specifications for the
17 construction of the portables. Gelco Space specified the design of
18 the portables and submitted these plans to state of Washington for
19 approval. The specifications submitted to NBS by Gelco Space,
20 following approval by the state, called for NBS to comply with the
21 Washington Gold Label in manufacturing the portables. The Washington
22 Gold Label standard does not specifically require a one inch clearance
23 between the heating element portion of a heat pump and any combustible
24 material, and the industry custom for such clearances was one-quarter
25 inch. NBS exceeded industry standards by providing a three-eighths
26 inch clearance between the heating element portion of the Nordyne heat
27 pumps and combustible materials. Upon completion of the portables in
28

1 question, the Washington State Department of Labor and Industries
2 affixed a Gold Label seal to the unit at the Indian Trails Elementary
3 School indicating that the portable was compliant with state
4 standards. It is significant to note that examination of the
5 portables following the School District's retrofit reveals that a one
6 inch clearance is still not provided between the heating element
7 portion of the heat pumps and combustible materials for the first
8 three feet of the supply duct on several of the portables. The School
9 District cannot maintain a claim of unfairness for NBS' 1992
10 installation of the heat pumps due to clearance issues when those same
11 alleged clearances persist following their retrofit. The evidence
12 demonstrates that NBS was not unfair, their installation methods were
13 not deceptive, they complied with the plans and specifications
14 provided by Gelco Space's engineering staff (and approved by the
15 state), and they performed work in accordance with the Washington Gold
16 Label design review process.

17
18 Plaintiff's claim against NBS for a violation of the Washington
19 state CPA, RCW 19.86.020, is without merit. With regard to the CPA
20 Claim, the undersigned finds in favor of Defendant NBS and against
21 Plaintiff Spokane Public Schools.
22

23 **2. Nordyne, Inc.**

24 Plaintiff claims that Nordyne violated the Washington CPA by
25 supplying NBS with heat pumps that did not come with labels advising
26 what the proper clearance should be between the heat pump and
27 combustible materials.
28

///

1 Plaintiff argues that the Uniform Mechanical Code required that
2 the heat pump supplied by Nordyne for installation on the portables
3 manufactured by NBS and supplied to Spokane Public Schools possess a
4 label affixed to the exterior housing specifically identifying the
5 proper clearance between the heat pump and combustible materials. The
6 label on the heat pump supplied for installation on the portable that
7 caught fire on October 20, 2001 at the Indian Trail Elementary had no
8 visible information inserted on the label that was affixed to the heat
9 pump. In checking all other Nordyne heat pumps installed on all of
10 the other portables supplied by NBS to Spokane Public Schools in 1992,
11 it was discovered that none of the labels on these heat pumps
12 possessed any visible clearance information as well. Plaintiff
13 therefore contends that the failure to warn or give adequate
14 instructions for the need of the one inch clearance on the affixed
15 label is an unfair and deceptive "act."

17 Nordyne indicates that implicit in the definition of "deceptive"
18 is the understanding that the actor misrepresented something of
19 material importance. *Potter v. Wilbur-Ellis, Co.*, 62 Wash.App. 318,
20 327 (1991). Failure to warn of inherent dangers in the use of a
21 product is not a deceptive or unfair act unless the manufacturer or
22 seller knows of the dangers and by failing to reveal them
23 misrepresents the safety of the product. *Hiner v.*
24 *Bridgestone/Firestone, Inc.*, 91 Wash.App. 722, 730 (1998).

26 The evidence has shown that information regarding construction of
27 a one inch clearance was contained in the heat pump's installation
28 instructions which were shipped with the unit, and these installation

1 instructions were also provided to the Plaintiff School District. It
2 was reasonable for Nordyne to assume that the manufacturer would
3 comply with their installation instructions. However, the evidence
4 demonstrates that NBS constructed the portables in compliance with the
5 plans and specifications it was provided by Gelco Space's engineering
6 staff and in accordance with the Washington Gold Label design review
7 process. NBS did not rely on Nordyne installation instructions.
8 Furthermore, Nordyne's installation instructions were provided to the
9 Spokane Public Schools, thus Nordyne could not be viewed as
10 misrepresenting anything and the purchasing public could not be viewed
11 as deceived. *Caviezel*, 42 Wash.App. at 261; *Potter*, 62 Wash.App. at
12 327. Plaintiff has also failed to show that anyone relied on the
13 affixed label for installation or warning. Accordingly, Nordyne
14 cannot be said to have committed an "unfair or deceptive" act for
15 failure to warn or adequately instruct regarding the installation of
16 its product.
17

18 The bottom line is that it is undisputed that the School District
19 had the Nordyne unit installation instructions which explicitly called
20 for installation with a one inch clearance. Since it has been
21 demonstrated that the School District had the installation
22 instructions, they cannot claim that they were deceived. Therefore,
23 with regard to Plaintiff's Washington state CPA claim, RCW 19.86.020,
24 the undersigned finds in favor of Defendant Nordyne and against
25 Plaintiff Spokane Public Schools.
26

27 ///

28 ///

Conclusion

After a bench trial, the Court finds that Plaintiff Spokane Public Schools has failed to establish that Defendant Nordyne was liable under the Washington Product Liability Act for defective design or failure to warn, or that Defendant NBS was liable under the Washington Product Liability Act for defective construction. Plaintiff has additionally failed to show that either Defendant is liable pursuant to the Washington Consumer Protection Act. Consequently, this Court finds in favor of both Defendants and against Plaintiff on all claims and enters this verdict accordingly.

The District Court Executive shall forward copies of this Findings of Fact and Conclusions of Law to counsel and enter judgment in favor of Defendants and against Plaintiff on all claims.

DATED this 13th day of March, 2006.

S/ Michael W. Leavitt

MICHAEL W. LEAVITT
UNITED STATES MAGISTRATE JUDGE